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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 196

SANFORD J. MOORE, SHERWOOD SCHWACH, and ALLEN KERNER, *Petitioners,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 30, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No.

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Sanford J. Moore, Sherwood Schwach and Allen Kerner pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 18, 1961.

CITATION TO OPINION BELOW

The per curiam opinion of the Court of Appeals for the Second Circuit, dated May 18, 1961, is not yet reported. A copy thereof is annexed to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1961. On June 12, 1961, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including July 1, 1961.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 32(d), Fed. Rules Crim. Proc., permits the withdrawal of a guilty plea prior to sentencing only where the plea was entered involuntarily, unknowingly or without full knowledge of the consequences, or whether the Rule also permits withdrawal where "any reason" appears demonstrating that the substitution of a not guilty plea "seems fair and just."

2. Whether a District Court abuses its discretion under Rule 32(d), Fed. Rules Crim. Proc., and frustrates appellate review of its action in denying a motion to withdraw a guilty plea, by relying in whole or in part upon factors which are deliberately kept secret from the defendant, his counsel and the appellate court.

RULE INVOLVED

Rule 32(d) of Federal Rules of Criminal Procedure:

> **Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

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[1] On June 9, 1961, Mr. Justice Harlan denied an application for a stay of the Court of Appeals mandate pending certiorari proceedings.

STATEMENT OF THE CASE

On February 24, 1961, an indictment was filed against the petitioners asserting violations of 18 U.S.C. §§2, 152 and 371. That indictment charged petitioners with (1) concealing from the receiver and trustee in bankruptcy of the Gibraltor Amusements, Ltd., some 203 coin-operated music machines "and other property" worth approximately $100,000 belonging to the estate of the bankrupt, (2) fraudulently transferring and concealing 73 coin-operated machines in contemplation of bankruptcy, and (3) conspiring to conceal from the receiver and trustee the aforesaid 203 machines "and other property" of the bankrupt.

On March 9, 1961, petitioners' counsel stated to the District Court that the "defendants against the express advice of counsel wish to plead guilty to the indictment." The clerk of the court thereupon read the indictment to the three petitioners and asked them if they understood (1) that each of them had a right to a speedy and public jury trial, (2) that they were entitled on trial to compulsory process to obtain witnesses in their behalf and entitled to be confronted with witnesses against them, and (3) that the court had the power, in light of their guilty pleas, to sentence them to imprisonment terms. To each of those questions, the petitioners answered in the affirmative and then stated specifically that it was still their desire to plead guilty. They denied that any threats or promises had been made to induce the guilty pleas and answered "yes" to the clerk's inquiry as to whether the pleas were "being made voluntarily on your parts". The court thereupon set March 30 as the date for sentencing.

But during the interval between March 9 and March 29, the petitioners came to the realization of what the

guilty pleas actually meant to them and their families, especially in light of their knowledge and belief that they were actually not guilty of the alleged crimes. The enormity of their error and of the consequences of their guilty pleas finally penetrated their consciousness. Then, too, pending litigation concerning the validity of the bankruptcy proceedings underlying the indictment began to raise substantial questions in their minds about the advisability of the guilty pleas.[2] And so on March 29, 1961, at about 7:30 P.M., they authorized their attorney to withdraw their pleas of guilty and to substitute pleas of not guilty.

A transcript of the proceedings the following morning before Judge Rayfiel is part of the certified record before this Court. Before sentences were imposed, petitioners' counsel moved under Rule 32(d), Fed. Rules Crim. Proc., to withdraw the guilty pleas. After an extensive colloquy between counsel and the judge, the motion was denied and sentences were imposed. Petitioner Moore was sentenced to 3 years imprisonment, petitioner Schwach 2 years, and petitioner Kerner 15 months. Of particular pertinence are the following excerpts from this transcript:

> MR. BECKER [Counsel for petitioners]: Your Honor, I have an application to make.

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[2] Following oral argument on March 22, 1961, the Court of Appeals for the Second Circuit on May 24, by a divided 2-1 vote, affirmed the order of adjudication. *Gibraltor Amusements, Ltd.* v. *Wurlitzer Co.*, Docket No. 26812 (C.A. 2). It is contemplated that a petition for certiorari to review that judgment will be duly filed. the case raises a serious and unresolved question as to whether the bankruptcy proceeding was properly instituted by the requisite three creditors. One of the three was a wholly owned financing subsidiary of one of the other creditors and merely purchased certain of the bankrupt's notes held by the parent creditor.

I don't know whether you recollect the date of the pleading, but you will recall that at the time I made a statement to the effect that this plea of guilty being made by the defendants was against my direct advice and considered opinion. You then asked Mr. Williams and myself to approach the bench, and there I repeated the reason why I thought that there wasn't a crime, as alleged, and that there was no proof.

You then asked me why they were doing this, since they were apparently men of intelligence. At that time I said that I didn't know.

Your Honor, the defendants have decided that they would wish to withdraw their previous plea, of course, and that is subject to your Honor's discretion. They have felt that they would rather prove their innocence and not stain their families and their children by a plea to which they don't think they are guilty.

That was one of the reasons I made that statement the last time.

Now, your Honor, there has been no prejudice to anybody by this 21-day delay.

I might further add that I only argued the appeal in the Circuit Court of Appeals on March 22nd, that is with respect to an adjudication in this case.

Should that adjudication be reversed, there could be no indictment, the indictment would have to fall.

In addition, may I add there was a civil procedure pending against 25 defendants, including two banks, seven factors and other defendants involving the same property which is the subject of this indictment.

When all of these factors are taken into consideration, I think that we have a claim to your Honor's discretion to permit us to withdraw the plea of guilty and plead not guilty, and then have this case tried by a jury of these men's peers. [Tr. 2-3]

* * * *

THE COURT: . . . To me this application, I take it, is an application for leave to withdraw the plea of guilty and substitute a plea of not guilty, is—

MR. BECKER: Yes, your Honor.

THE COURT: (continuing) —is, shall I say, very palpable, and I am sure that you know just what I mean. [Tr. 4]

• • • •

THE COURT: . . . I see no reason why I should grant this application for leave to withdraw the plea in the light of all that has occurred since the plea was entered, and which prompts me to refer to the reason for the application as being palpable. [Tr. 5]

• • • •

THE COURT: The test is: Was this plea voluntarily made? In answer to that question, because of your statement to the Court at the time that the plea was entered, or just immediately prior to it, and because of what transpired at the sidebar conference, following that I made sure that I got a specific answer to the questions which are generally asked of the defendants who enter pleas of guilty to informations or indictments. [Tr. 5-6]

• • • •

THE COURT: Mr. Williams, do you want to address yourself to this?

MR. WILLIAMS [Assistant U. S. Attorney]: Yes, your Honor I do. At the time your Honor accepted the plea of guilty from these three individuals, there was a searching inquiry by the Court as to their specific desires. I believe the record must show that your Honor was satisfied that the men knew what they were doing at the time of the entry of the plea: The record is clear as to that. Your Honor, I don't think that the interests of justice would be served at this point, by allowing them to withdraw the plea.

MR. BECKER: How is the interest of justice injured by the withdrawal of the plea?—I am just answering Mr. Williams.

THE COURT: I must repeat, I must repeat this: I think their reasons for this application are palpable. Now, I have said that three times, and I am sure you understand just what I mean. I am going to deny your application.

MR. BECKER: Would your Honor let me say that your Honor has a great advantage of me, you talked about "palpable", and those are concerning things which are not within my knowledge, and I say that as an officer of this Court.

THE COURT: I am not charging you, I am not charging you, not at all. I am not charging you. [Tr. 9-10]

• • • •

MR. BECKER: Your Honor, may I say this: From your Honor's statement off the bench, you know a lot more than I as to what is going on.

THE COURT: I think I do.

MR. BECKER: I am a little perturbed to be operating in darkness, so to speak, very frankly.

THE COURT: I don't think you are operating in the dark, particularly, but I believe I do have more information than you have with respect to certain phases of this matter, considerably [sic] than you with respect to the proceedings which have been had in the bankruptcy Court here, but I am not confining it to that. [Tr. 12]

• • • •

THE COURT: I am constrained to adhere to what I indicated my decision would be.

MR. BECKER: No one has been prejudiced, your Honor.

THE COURT: I must decline to grant your application.

MR. BECKER: No one has been prejudiced. No one has been prejudiced.

THE COURT: I know that, I know that, but you probably don't know all the reasons which I have for taking this course.

MR. BECKER: Well, I say that I may be operating in a great area of darkness.

THE COURT: Perhaps it is just as well, insofar as those matters are concerned, that you continue to operate in that area of darkness. [Tr. 20-21]

• • • •

THE COURT: Absent a good sound reason for the granting of an application of this kind, I am compelled to deny it because of the fact that these are intelligent men who were well represented by experienced and capable counsel, who knew exactly what they were doing, who in answer to questions asked them, stated that the act was their voluntary act, and that they were made no promises and no threats, in order to induce them to enter a plea. Now, those positive answers to those questions is to me proof positive that they knew what they were doing all the time. There is no reason why I should— [Tr. 21-22]

• • • •

MR. BECKER: Let me say this your Honor. If the Circuit Court of Appeals reverses [the bankruptcy adjudication], then these men who have pleaded guilty, will have pleaded guilty to a crime which was never committed.

THE COURT: If such a thing should happen, then you have a remedy for that.

MR. BECKER: You have 60 days in which to ask for relief.

THE COURT: That is right.

MR. WILLIAMS: That is correct, and at any time there is 2255.

THE COURT: Yes, 2255, under any circumstances, there is no question about that. [Tr. 25-26]

• • • •

THE COURT: . . . I think you have not laid what I regard as an adequate and proper basis for the granting of leave to withdraw their pleas of guilty, and to enter pleas of not guilty. That is the reason why I deny the application. [Tr. 34]

On appeal, the Court of Appeals affirmed the action of the District Court, stating that the petitioners had made no attempt to deny that they had made their pleas of guilty knowingly and voluntarily and with full knowledge of the possible consequences. The conclu-

sion was that no abuse of discretion had been shown on the part of the District Court.[3] But no mention was made by the Court of Appeals of the considerations growing out of the foregoing remarks of the District Court regarding the "palpable" nature of the application and the superior and unrevealed knowledge of the judge which apparently influenced his action, despite the fact that these considerations were brought to the attention of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below is inconsistent with the pertinent decisions of this Court and of the Court of Appeals for the District of Columbia Circuit.

The Court of Appeals below, like the District Court, held that a motion to withdraw a plea of guilty, filed before sentence pursuant to Rule 32(d), Fed. Rules Crim. Proc., is to be judged by the narrow standard of whether the petitioners "entered their pleas knowingly and voluntarily, and with full knowledge of the possible consequences." If they did so enter their pleas—as was found here—the motion was held to have been properly denied.

In so holding, however, the court below applied a standard that falls short of the principles set forth by this Court in *Kercheval v. United States*, 274 U.S. 220, 224, for testing motions to vacate pleas of guilty. There the Court stated that a guilty plea will be vacated not only if it is shown "to have been unfairly obtained or given through ignorance, fear or inadvertence" but also where it appears "for any reason" that the granting

[3] The Court of Appeals further stated, without indicating the significance under Rule 32(d), that on the appeal counsel "does not offer any direct affidavits from them, but advances only his own assertions and hearsay belief in his clients."

of the privilege of substituting a plea of not guilty "seems fair and just." Obviously the substitution of a not guilty plea may be fair and just even where it cannot be shown that the original plea of guilty was entered involuntarily or unintentionally or without full knowledge of possible consequences. New factors—such as a significant change in the law or in availability of evidence—may make the substitution fair and just however voluntary and intelligent the original plea may have been.

Rule 32(d), in relation to motions to vacate filed prior to sentencing, would seem to embody the *Kercheval* principles. It provides that "A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of sentence is suspended; . . ." Since the motion in this case was made before rather than after imposition of sentence, the second portion of Rule 32(d), permitting withdrawal after sentence only "to correct manifest injustice", does not come into operation.[4]

A motion made before imposition of sentence, of course, is addressed to the sound discretion of the District Court. But in exercising that discretion, the court would appear bound to apply the principles of the *Kercheval* case and look beyond the mere voluntariness of the original plea. In other words, any reason which would make the withdrawal and the substitution "fair and just" should also be considered. And it is that more liberal approach to these motions that has been adopted by the Court of Appeals for the District of

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[4] "When, however, as here, the motion to withdraw the plea is made before sentence is imposed, this court has interpreted the first clause of Rule 32(d) to set a more lenient standard." *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.).

Columbia Circuit. As stated in *Poole* v. *United States*, 250 F. 2d 396, 400 (App. D.C.), "Leave to withdraw a guilty plea prior to sentencing should be freely allowed." Again, in *McJordan* v. *Huff*, 133 F. 2d 408, 409 (App. D.C.), that court said that "it goes without saying that a plea of guilty at that time [arraignment] can be and often is changed, on proper motion, as a matter of course." And see *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.).

Had the District Court in this case sought to determine whether there were "fair and just" reasons for allowing a change in the pleas, rather than just inquiring into the voluntariness of the original pleas, such reasons have been found. While petitioners acted voluntarily and with knowledge of the consequences in pleading guilty, they also acted under the great strain of the prolonged bankruptcy proceedings, which had desensitized them to the full legal and practical import of the indictment. Rejecting the advice of their own counsel, they were unable to grasp the strategic value of the pending litigation over the bankruptcy adjudication and the possible impact that litigation might have on the outcome of the criminal proceedings.[5] And the Government countered with no reason whatever why the withdrawal of the pleas would be unjust or unfair; the prosecutor contented himself with the remark that the pleas had been voluntary and

[5] While a reversal of the bankruptcy adjudication could not affect the validity of the indictment, such a reversal might well alter the prosecution's determination to go ahead with the criminal trial or affect the sentence imposed after trial and conviction. Both the trial judge and the prosecutor showed an awareness of these possibilities in their references to the availability of a motion to correct an illegal sentence under Rule 35 and of a motion under 28 U.S.C. § 2255. Tr. 25-26.

that "I don't think that the interests of justice would be served at this point, by allowing them to withdraw the plea." Tr. 10. No showing was made that the Government would in any way be prejudiced by the change in pleas, that its witnesses were no longer available, or that preparations for trial would in any way be hampered.

Thus it becomes appropriate for this Court to resolve the conflict between the standard applied by the court below in testing the motion to change the pleas and the standard set forth in the *Kercheval* case and applied to Rule 32(d) motions by the Court of Appeals for the District of Columbia Circuit. That appropriateness is underscored by the absence of a definitive ruling by this Court as to the proper standard to be applied to motions filed under Rule 32(d) prior to sentencing.

2. The decision below raises an important question as to the reviewability of a District Court's exercise of discretion in denying, for certain unstated reasons, a motion to withdraw guilty pleas.

It is axiomatic, of course, that a motion to withdraw a plea of guilty and to substitute a plea of not guilty is addressed primarily to the discretion of the trial court. There is no absolute right to change the plea. And the court's action within the realm of its lawful discretion is not subject to review. Only an abuse of that discretion warrants any appellate inquiry. The Court of Appeals here recognized those basic principles and purported to apply them, concluding that "We do not think this case shows any abuse of discretion."

Apart from and in addition to the issue as to whether the courts below applied the proper legal standard in testing the effort to change petitioners' pleas is a most

serious question whether the District Court abused its discretion in such a way as to make it impossible for the Court of Appeals intelligently to perform its limited function. Time and again, as the transcript shows, the District Court alluded to the "palpable" nature of the application—without ever defining what was meant by "palpable"—and to certain mysterious events that apparently transpired outside the record of this case and subsequent to the original pleas herein. These events and their significance and pertinence were not revealed by the court and remain unknown to this day to the petitioners, their counsel and the Court of Appeals.

The District Judge emphasized repeatedly that he was motivated to deny the application not solely on the basis of the considerations put forth on petitioners' behalf but also on the basis of certain information which he alone had and as to which the petitioners' counsel was in the dark. He could see "no reason" to grant the application "in light of all that has occurred since the plea was entered, and which prompts me to refer to the reason for the application as being palpable." Tr. 5. And when petitioners' counsel objected to being kept in the dark about such matters, the court responded that "Perhaps it is just as well, insofar as those matters are concerned, that you continue to operate in that area of darkness." Tr. 21.

As the Court of Appeals for the District of Columbia Circuit has well said, the discretion which is properly exercisable by a trial court under the first clause of Rule 32(d) "must be exercised on the basis of sound information, soundly viewed." *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.). The exercise of judicial discretion in any area, this Court has said,

"implies conscientious judgment, not arbitrary action." *Burns* v. *United States*, 287 U.S. 216, 222-223. Discretion, in other words, "should not be a word for arbitrary will or inconsiderate action," *The Styria* v. *Morgan*, 186 U.S. 1, 9, but must be "directed by the reason and conscience of the judge to a just result." *Langnes* v. *Green*, 282 U.S. 531, 541.

Thus it is not enough to say that a matter is within the trial court's discretion and unreviewable save for an abuse of discretion. To determine if there has been an abuse, the matters motivating the exercise of discretion must be made apparent. Otherwise the reviewing body cannot intelligently determine if an abuse has in fact occurred. See *Ex parte Farmers' Loan & Trust Co.*, 129 U.S. 206, 215. But if the factors which in whole or in part motivate the court to deny leave to withdraw a guilty plea are kept secret, how can the applicant hope to meet his burden of demonstrating "fair and just" reasons for allowing the change in pleas? How can he demonstrate the possible inaccuracy or lack of pertinence of the secret factors? And how can an appellate court be sure that the trial court's discretion has not been abused? In this area of criminal guilt, where a man's liberty hangs in the balance, appellate courts have a special responsibility for determining that such discretionary power is not abused. Cf. *Green* v. *United States*, 356 U.S. 165, 188. Yet such secret motivations as were exhibited by the District Court in this case make it impossible for the Court of Appeals or even this Court to meet that responsibility.

In other words, the exercise of discretion by the District Court can be approved or disapproved only in light of the factors and motivations revealed by the court. If secret considerations known only to the court

are *per se* improper, then the action here cannot stand.[6] See *Service* v. *Dulles*, 354 U.S. 363, 372. At the very least, the court's reliance on these unknown factors makes it impossible for an appellate court to know what the trial court's action means and hence whether it is right or wrong.[7] Cf. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511; *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 332 U.S. 194; *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654. In such circumstances, petitioners are entitled to a re-evaluation of the motion by the District Court so that the basis of its action may become clear and any abuse of its discretion corrected.

These are matters, moreover, which go to the basic fairness of the hearing on a motion to withdraw a plea of guilty before sentence. Are the applicants entitled to know all the considerations involved in passing upon their applications? Cf. *Mattox* v. *United States*, 156 U.S. 237, 242-244; *Kirby* v. *United States*, 174 U.S. 47; *Motes* v. *United States*, 178 U.S. 458, 474; *In re Oliver*, 333 U.S. 257, 273. Is it proper to apply Rule 32(d) in such a way as to disregard the "fair and just" reasons submitted in support of the application and to deny

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[6] This problem is not avoided by the fact that the District Court, rather inconsistently, at times stated that it was not confining its ruling to these secret considerations (Tr. 12) and that petitioners had not laid an adequate basis for changing their pleas (Tr. 34). The fact is that the court was substantially motivated by these secret factors. See Tr. 20-21.

[7] Cf. Rule 52(a), Fed. Rules Civil Proc., as to which it has been held that a trial court's findings of fact should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which the trial court reached its decision. *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 422; *Irish* v. *United States*, 225 F. 2d 3, 8 (C.A. 9).

withdrawal of a plea on considerations which are conceded to be within the "area of darkness"?

An important and hitherto unresolved question is thus raised as to the administration of Rule 32(d) in the federal courts and as to the reviewability of denials of motions to withdraw guilty pleas.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reviewed upon the grant of this petition for a writ of certiorari.

Respectfully submitted,

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June 30, 1961

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 364—October Term, 1960.

(Argued April 11, 1961 Decided May 18, 1961.)

Docket No. 26909

UNITED STATES OF AMERICA, *Appellee*,

—v.—

SANFORD J. MOORE, SHERWOOD SCHWACH and ALLEN KERNER, *Defendants-Appellants*.

Before: CLARK, MEDINA and FRIENDLY, *Circuit Judges*.

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *Judge*.

Defendants appeal from a judgment denying their motions to withdraw pleas of guilty to an indictment charging violation of 18 U. S. C. §§ 2, 152, 371. Judgment affirmed.

GEORGE BECKER, New York City, *for defendants-appellants*.

AVERILL M. WILLIAMS, Asst. U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Elliott Kahaner, U. S. Atty., Brooklyn, N. Y., on the brief), *for appellee*.

PER CURIAM:

Defendants appeal from a judgment denying their motions to withdraw pleas of guilty to a three-count indictment charging them with fraudulently concealing the assets of a bankrupt estate and with conspiring to do so. 18 U. S. C. §§ 2, 152, 371. The pleas in question were entered against the advice of counsel on March 9, 1961, before Judge Rayfiel, who set March 30, 1961, as the date for sentencing. When defendants appeared in court for sentencing on that day, they moved under F. R. Crim. Proc. 32(d) to withdraw their pleas of guilty. Denying the motions, Judge Rayfiel sentenced the defendants to prison terms of three years, two years, and fifteen months, respectively.

A motion to withdraw a plea of guilty is addressed to the sound discretion of the district court. Before pleading guilty, defendants were carefully questioned by the clerk in the presence of the court, and acknowledged they understood that they had the right to a speedy and public trial by an impartial jury, that they were entitled to compulsory process to obtain witnesses in their behalf and to be confronted by the witnesses against them, that they could be sentenced to imprisonment, and that they were pleading guilty voluntarily, without any threat or promise to induce them so to plead. On this appeal, defendants make no attempt to deny that they entered their pleas knowingly and voluntarily ,and with full knowledge of the possible consequences. Furthermore, their counsel does not offer any direct affidavits from them, but advances only his own assertions and hearsay belief in his clients. We do not think this case shows any abuse of discretion. See *United States* v. *Panebianco*, 2 Cir., 208 F. 2d 238, certiorari denied *Panebianco* v. *United States*, 347 U. S. 913.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of May, one thousand nine hundred and sixty-one.

Present: HON. CHARLES E. CLARK, HON. HAROLD R. MEDINA, HON. HENRY J. FRIENDLY, *Circuit Judges.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SANFORD J. MOORE, SHERWOOD SCHWACH and ALLEN KERNER, *Defendants-Appellants.*

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 196

SANFORD J. MOORE, SHERWOOD SCHWACH AND ALLEN KERNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) has not been reported.

JURISDICTION

The judgment of the court of appeals was entered May 18, 1961 (R. 57). On June 12, 1961, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 1, 1961. The petition for a writ of certiorari was filed June 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was an abuse of discretion for the district court to deny a motion to withdraw a plea of guilty, made on the day set for sentencing but before sentence was imposed, where the plea had admittedly been voluntarily entered with full knowledge of the consequences, and no valid reason was advanced for withdrawal.

RULE INVOLVED

Rule 32(d), F.R. Crim. P., provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioners were indicted in the United States District Court for the Eastern District of New York on three counts charging (1) concealing from the receiver and trustee in bankruptcy of the Gibraltor Amusements, Ltd., 203 coin operated music machines worth approximately $100,000, which were property belonging to the estate of the bankrupt; (2) transferring in contemplation of bankruptcy approximately 73 machines; and (3) conspiracy (R. 2–5). On March 9, 1961, their counsel reported that, against his advice, the petitioners wished to plead guilty (R. 6, 7). Before accepting the plea, the court assured itself that petitioners knew their rights; knew that they could be sentenced to imprisonment; and

were acting without threat or promise to induce them to plead (R. 10-13). The court then set March 30 as the date for sentencing (R. 12).

On the day set for sentencing, counsel, without offering any affidavits by petitioners, stated that petitioners wished to withdraw their pleas. Counsel said that he had on March 22 argued in the court of appeals an appeal from the adjudication in bankruptcy, and that should that adjudication be reversed, the indictment would have to fail (R. 15–16).[1] Counsel admitted that petitioners knew what they were doing when they pleaded guilty, but stated that they ought to be allowed to defend themselves (R. 18–19). The court (which had a pre-sentence report, since the plea of guilty had previously been accepted) noted that it saw no reason to "grant this application * * * in the light of all that has occurred since the plea was entered, and which prompts me to refer to the reason for the application as being palpable" (R. 18). The court stated that it believed that it did have more information than counsel with respect to certain phases of the matter, and added, "but I am not confining it to that" (R. 25). Counsel then again reverted to the possibility that the adjudication would be set aside (R. 28–30). Beyond that the reason given for the requested change of plea was the effect on petitioners' families (R. 32–33). The court said (R. 34–35):

> Absent a good sound reason for the granting of an application of this kind, I am compelled to

[1] The adjudication was affirmed on May 24, 1961.

> deny it because of the fact that these are intelligent men who were well represented by experienced and capable counsel, who knew exactly what they were doing, who in answer to questions asked them, stated that the act was their voluntary act, and that they were made no promises and no threats, in order to induce them to enter a plea.
>
> Now, those positive answers to those questions is to me proof positive that they knew what they were doing all the time.

When counsel urged that, if the adjudication in bankruptcy should be reversed, there would be no crime, the court stated that in such event 28 U.S.C. 2255 would be available to correct the error (R. 42–44). The court denied the motion for a change of plea, stating (R. 47):

> I think you have not laid what I regard as an adequate and proper basis for the granting of leave to withdraw their pleas of guilty, and to enter pleas of not guilty.

Before sentencing the petitioners, the court asked if any of them wished to make a statement, and each replied in the negative (R. 47). The court mentioned some of the information disclosed by the pre-sentence report—that by "very clever" devices the petitioners were able to dispose of the machines, possibly by shipment to England (R. 48–49). He then sentenced petitioners as follows: concurrent sentences on each of the three counts of three years' imprisonment for Moore, two years for Schwach and fifteen months for Kerner (R. 49–50).

The court of appeals, in affirming the action of the

district court denying leave to withdraw the plea of guilty, noted that not only was there no denial that petitioners entered their pleas voluntarily and knowingly, but that no direct affidavits from the petitioners were offered, only counsel's assertions and hearsay (Pet. App. 1a–2a).

ARGUMENT

Petitioners do not in this Court rely upon the argument made by counsel before the district court on the motion to withdraw the pleas, that the possibility that the adjudication in bankruptcy might ultimately be reversed would exonerate them of guilt. They apparently realize that, since the district court had jurisdiction of the petition in bankruptcy and authority to appoint a receiver to take over the assets of the bankrupt estate pending adjudication, knowing concealment of assets of the estate is an offense, regardless of the validity of the bankruptcy adjudication. *United States* v. *Agresti*, 130 F. 2d 152 (C.A. 2); *United States* v. *Kramer*, 279 F. 2d 754 (C.A. 3), certiorari denied, 364 U.S. 879.[2] Beyond this, the only reason offered for the change of plea was the effect on petitioners' families, hardly a matter about which petitioners could have been unaware at the time they knowingly pleaded guilty. It is significant that, be-

[2] Petitioners now argue that a reversal of the adjudication might affect the attitude of the prosecution or the sentence of the court (Pet. 11, fn. 5). They point to the fact that on the hearing reference was made to the procedure for reduction of sentence. It is evident, however, that the prosecutor and the judge, who had apparently not expected the motion to withdraw, were merely accepting arguendo defense counsel's statement of the law.

fore sentencing, when petitioners were asked by the court if any of them had anything to say, none of them made any statement. Petitioners' position reduces itself to the proposition, therefore, that because their motion to withdraw was made by counsel in their behalf before sentencing, it was an abuse of the discretion of the district court to deny the application, even though no reason for the change of plea was offered. In other words, their argument would withdraw all discretion from the district court with respect to a motion to withdraw a plea of guilty before sentence.

Rule 32(d), in providing for a "motion" to withdraw a plea of guilty, obviously contemplates that there be discretion in the district court to grant or deny the motion. Motions to withdraw pleas of guilty before sentence are considered with more liberality than such motions made after sentence has been imposed, but even so the grant or denial of the motion rests in the sound discretion of the court. Petitioners point to no case in which the denial of a motion to withdraw before sentence was deemed an abuse of discretion where there was as searching an inquiry before the plea was accepted as was made here, and where there was as little explanation of any reason for the motion to withdraw. On the contrary, there are a number of cases in which denials of motions to withdraw, on stronger showings than were made here, have been upheld. See *High* v. *United States,* 288 F. 2d 427, 431 (C.A.D.C.), certiorari denied, 366 U.S. 923; *Vasquez* v. *United States,* 279 F. 2d 34 (C.A. 9); *United States* v. *Pane-*

bianco, 208 F. 2d 238 (C.A. 2), certiorari denied, 347 U.S. 913.

A plea of guilty is a solemn act, not to be entered by a defendant either lightly or tentatively, not to be accepted by a court without assurance that it is made knowingly and voluntarily (Rule 11, F.R. Crim. P.); its significance will be diluted if it can be changed indiscriminately. Moreover, there is administrative reliance on the entry and acceptance of a guilty plea, such as in the management of the court's calendar and in the development of a pre-sentence report under Rule 32(c). None of these considerations may be sufficient to outweigh the right of a defendant to change his plea when he shows some valid reason for his motion to withdraw, but they are sufficient to justify the requirement, which all the cases recognize, that, after a plea of guilty has been knowingly and voluntarily entered, a defendant who moves to withdraw the plea must offer some reasonable basis for his motion. That these petitioners failed to do.

Petitioners argue that because the judge, who had obviously read the pre-sentence report, said that he could surmise the reason for the change of plea, this shows that he acted on the basis of undisclosed knowledge. But the judge in his ultimate ruling made it clear that the basis for his ruling denying the motion to withdraw was that petitioners had not made an adequate showing to support their motion (R. 47). And since petitioners personally made no showing at all, and their counsel in their behalf offered (in addition to the legal argument no longer

pressed) only the statement that petitioners had come to realize what the plea meant to their families, this ruling was clearly correct. There is no occasion for this Court to review the exercise of discretion by the trial judge which has been upheld by the court of appeals.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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